Supreme Court, U.S.
FILED

No. _____ 02 514 SEP 30 2002

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In The

Supreme Court of the United States

STUART H. SMITH, JR.,

Petitioner,

versus

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the six month limitation period for presenting claims pursuant to 29 U.S.C. § 160(b) the National Labor Relations Act applies to a contract action brought in a State Court, and is applicable to a claim for breach by the Petitioner, a licensed Merchant Marine Officer and Supervisor, not considered an employee under 29 U.S.C. § 152(3).

Assuming, arguendo, that the six month limitation period in 29 U.S.C. § 160(b) applies to Petitioner's claim, whether Respondent's arbitrary refusal to proceed to arbitration, or cooperate with Petitioner in the production of evidence, in light of the Coast Guard's actions tolled the limitation period.

PARTIES TO THE PROCEEDINGS

The following individuals and entities are parties in the Court below:

STUART H. SMITH, JR, Petitioner

THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, Respondent

WATERMAN STEAMSHIP CORPORATION, a corporation having a Collective Bargaining Agreement with the Respondent, INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS.

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United States District Court for the Eastern District of Louisiana, Civil Action 01-1257(T)(1) STUART SMITH, JR. VS. INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS Appendix 8-20.

STATEMENT OF THE BASIS FOR JURISDICTION

A. The United States District Court for the Eastern District of Louisiana exercised subject matter jurisdiction over Petitioner's claim pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(b).

B. The Fifth Circuit Court of Appeal exercised jurisdiction over Petitioner's appeal from a final decision of U.S. District Court pursuant to 28 U.S.C. § 1291.

C. SMITH's appeal was timely filed pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure on December 7, 2001, within thirty (30) days after the District Court's Judgment was entered on November 9, 2001.

D. The United States Court of Appeals for the Fifth Circuit rendered its decision on the 17th day of July, 2002.

E. A Petition For Certiorari to this Court has been filed within ninety days of the decision of the Court of Appeals for the Fifth Circuit pursuant to Supreme Court Rule 13(1).

STATUTES INVOLVED

29 U.S.C. § 152(3):

> "(3) The term 'employee' shall include any employee, and should not be limited to the employees of a particular employer, unless the Act [subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act (45 U.S.C. § 151 et seq.) as amended from time to time, or by any other person who is not an employer as herein defined."

29 U.S.C. § 160(b):

> "No Complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the

person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge . . . "

29 U.S.C. § 185(b):

"Any labor organization which represents employees in an industry affecting commerce as defined in this Act (section), and any employer whose activities affect commerce as defined in this Act (chapter) shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a District Court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

STATEMENT OF THE CASE

On October 3, 1992, Petitioner, a licensed Merchant Marine Officer, was signed on the SS STONEWALL JACKSON as a Third Officer. SMITH was a member in good standing of the INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, an organization having a Collective Bargaining Agreement with WATERMAN STEAMSHIP CORPORATION.

Petitioner's duties included the supervision of activity on the STONEWALL JACKSON'S after deck as the ship was maneuvered from her berth. As the ship turned to head to sea in the Mississippi River, the stern came in

contact with the wharf resulting in damage to the ship and the wharf.

As a consequence of the allision, Petitioner was logged, and his employment terminated for an alleged failure to report distances accurately.

On October 7, 1992, Petitioner contacted the Respondent's Gulf Area Vice President to register a grievance because of the termination of his employment. The grievance was presented to WATERMAN, the employer, and on October 22, 1992, WATERMAN notified Petitioner that the company had not changed its position with respect to SMITH's termination, and refused to reinstate him.

Aware that it was incumbent on him to take all necessary steps to gather all possible evidence to support his grievance, petitioner brought the matter to the attention of the Respondent's General Counsel.

A copy of the Collective Bargaining Agreement, the Grievance Procedure, and subpoenas to compel depositions and production of evidence were requested from the General Counsel. The working agreement was provided on December 31, 1992. However, subpoenas were not issued or made available to Petitioner or his counsel.

An investigation of the casualty was conducted by the Coast Guard Office of Marine Inspection, but no report was issued. A complete investigation report was never produced.

On March 10, 1993, the Respondent's new General Counsel acknowledged that an arbitration hearing had been scheduled, but before a decision would be made to arbitrate the grievance, Petitioner was required to present

all evidence and arguments in support of his claim before arbitration would be set.

Five months passed with no action taken by the Coast Guard to provide a Record of Investigation or by the Respondent to resolve Petitioner's grievance. Obtaining evidence in support of Petitioner's grievance became all the more critical.

On April 5, 1993, counsel for Petitioner advised the Respondent's General Counsel that the Coast Guard Investigation Report had not been made available to the Petitioner despite his best efforts to obtain a copy. The arbitration could not proceed until a complete Coast Guard Investigation Report was in hand.

On April 6, 1993, the Respondent's Gulf Area Vice President advised that arbitration would be deferred until the complete Coast Guard report was available.

On July 9, 1993, Petitioner obtained a portion of the Coast Guard Report of Investigation pursuant to the Freedom of Information Act, and made the documents available to Respondent's General Counsel. The complete record was still not provided.

A request was again made for the issuance of subpoenas to compel production of documents and to compel attendance of witnesses. Subpoenas were requested for crew members of the vessel who were on board the ship in October, 1992, and who were still aboard the vessel in July, 1993.

Petitioner received no response to the request of July 9, 1993, and nothing further was heard with respect to an evaluation of Petitioner's grievance, issuance of subpoenas, or a referral of the matter to arbitration.

In the absence of a commitment by the Organization to work toward a resolution of the grievance, Petitioner had no alternative but to bring suit against Waterman for wrongful discharge. The suit was dismissed on a Motion for Summary Judgment based on a partial Coast Guard Investigation Report, ultimately repudiated by the Coast Guard in June, 1999.

Petitioner was required to bring suit pursuant to the Freedom of Information Act on the basis of the Coast Guard's failure to produce documents and records as requested. The Court entered Judgment for SMITH and against the Coast Guard noting that the Coast Guard's continuing refusal to respond to his request constituted a gross noncompliance with the Act.

Petitioner persisted in his efforts to obtain the complete record. On March 16, 1998, the Coast Guard reopened the investigation, and advised Petitioner that he would have an opportunity to provide information to the Coast Guard to be included in the Record of Investigation.

A corrected Coast Guard Report of Marine Casualty under date of June 30, 1999 was formally issued, and in effect, absolved Petitioner of fault for the allision, while finding the vessel's master responsible for failure to control the ship's movement, which resulted in allision.

ARGUMENT AND REASONS FOR GRANTING WRIT

Petitioner was a Licensed Officer and Member of the Organization in good standing at all material times.

The contract between Petitioner's employer and the Organization defines licensed ship's officers as supervisors and professionals. The National Labor Relations Act, 29 U.S.C. § 160(b) applicable to non-supervisory personnel, does not apply to licensed officers, who are supervisory employees, not subject to the National Labor Relations Act, or the six month limitation period required by 29 U.S.C. § 160(b).

The only issue addressed by the District Court and the Court of Appeal was whether Petitioner's claim against the Organization was time barred by 29 U.S.C. § 160(b).

The Act, 29 U.S.C. § 160(b) addresses Complaints For Unfair Labor Practices and provides:

> "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the Armed Forces, in which event the six month period shall be computed from the day of his discharge . . . "

Section 152(3) of the Act identifies those persons covered by the Act, and who are not considered employees or persons covered. Section 152(3) defines the term:

> " . . . the term employee . . . shall not include any individual employed as a supervisor . . . "

29 U.S.C. § 152(11) offers a further definition of the term "supervisor":

> "The term supervisor means any individual having authority, in the interest of the employer, to

> hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment . . . "

29 U.S.C. § 152(12) further defines professional employee as:

> " . . . (a) an employee engaged in work (i) predominately intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes . . . "

The Act clearly defines individuals who fall within the category of covered employees while excluding from this classification, supervisors or professional personnel. While Petitioner was licensed by the Coast Guard and was serving on board an oceangoing vessel as Third Officer, Petitioner did not make a claim or bring an action for Unfair Labor Practice pursuant to 29 U.S.C. § 160(b). Had he done so, the action would have been dismissed.

Section XXI of the Master Collective Bargaining Agreement between the Organization and WATERMAN STEAMSHIP CORPORATION provides:

> "(1) Supervisory and Professional. (a) The duties of officers are set forth in different sections of this agreement are incorporated by reference in this section.
>
> The Parties agree that the duties of the licensed deck officers, including master, shall be maintained in supervisory and professional. It is also agreed that the duties of master, chief officer, second officer, third officer, pilot officer, port relief officer or any other licensed deck officer (including staff captain and first officer, if carried), will not be assigned to any other person, licensed or unlicensed."

The contract identifies licensed deck officers as supervisors, one of the categories of employees not covered by 29 U.S.C. § 152(3). As supervisors and professionals, licensed officers are excluded from coverage under the Act. The courts have consistently held that licensed ship's officers do not fall within the category of covered employees.[1]

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[1] See *A. H. Bull Steamship Co. v. National Marine Engineers Beneficial Association*, 250 F.2d 332 (CA 2 – 1957); *Jensen v. Farrell*, 625 F.2d 379 (CA 2 – 1980); *Spentonbush Red Star Companies v. National Labor Relations Board*, 106 F.3d 484 (CA 2 – 1997); *Hanna Mining Co. v. District II, MEBA*, 382 U.S. 181, 86 S. Ct. 327, 15 L. Ed. 254, 139 N.W.2d 553 (1965); *District II, MEBA v. NLRB*, 353 F.2d 904 (CADC – 1965); *International Organization of Masters, Mates and Pilots v. NLRB and Cove Tankers Corp.*, 575 F.2d 896 (CADC – 1978); *Mon River Towing v. NLRB*, 421 F.2d 1 (CA 3 – 1969); *Dente v. International Organization of Masters, Mates & Pilots, Local 90*, 492 F.2d 10 (CA9 – 1974).

SMITH's claim against the Organization was brought in State Court as a contract dispute with the Organization, and calls for application of the Louisiana Civil Code, Article 3499 dealing with the prescriptive period of ten years for contract actions. As a supervisory employee, SMITH would have been prohibited from bringing a claim under the National Labor Relations Act even if he had wanted to.

Petitioner's grievance was completely ignored by the Organization and Petitioner had no other alternative but to proceed with a civil suit against the Organization which he was entitled to do under 29 U.S.C. § 185(b):

> "Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . . "

It has long been established that an individual may bring suit against an employer for breach of a collective bargaining agreement. Ordinarily, an employee must attempt to exhaust any grievance or arbitration remedies provided in the collective bargaining agreement, and will be bound by the finality provisions of the agreement. However, the rule can work an injustice when a union organization responsible for representation in the grievance/arbitration procedure acts in a dishonest, arbitrary or perfunctory fashion such as was the case in this matter.[2]

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[2] The District Court made a factual finding that the Organization did not pursue Petitioner's grievance for a number of reasons, but also found that the reasons for not bringing the matter to arbitration were not relevant, and the Organization had a duty as the collective bargaining agent to bring the grievance to arbitration.

By requesting numerous documents and by failing to bring the matter to a resolution, the Union acted in a perfunctory fashion, and therefore breached its duty of fair representation.[3]

In those instances where an employee brings suit against an employer under 29 U.S.C. § 185(a), there is no time limitation for bringing the action. 29 U.S.C. § 185(b) also addresses suits for breaches of contract between an employee and his/her labor organization.

In this case, the Organization was contractually obligated to address Petitioner's grievance and when it failed to do so, SMITH had no other alternative but to file suit.[4]

Because 29 U.S.C. § 185(b) contains no prescriptive period, the limitation period is determined as a matter of federal law by application of the State's statute or prescriptive period which in Louisiana is Article 3499 of the Louisiana Civil Code:

> "Unless otherwise provided by legislation, a personal action is subject to a liberative prescription period of ten years. . . . "

The Louisiana Ten Year Limitation Statute for Personal Actions has been held applicable to labor litigation. As a professional and supervisory employee, SMITH did not have the option of bringing an action under 29 U.S.C.

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[3] Findings of Fact, App. 15.

[4] *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842, 850 (1967).

§ 160(b), but did have the option of bringing a claim for relief in a civil action.[5]

In *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 163, the Court noted:

> "It has long been established that an individual employee may bring suit against his employer for breach of a collective bargaining agreement. *Smith v. Evening News*, 371 U.S. 195 (1962). Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the Collective Bargaining Agreement. *Republic Steel v. Maddux*, 379 U.S. 650 (1961); *Clayton v. Automobile Workers*, 451 U.S. 679 (1981); (Exhaustion of Intraunion Remedies not always required). Subject to very limited judicial review, he will be bound by the result according to the finality provision of the agreement. . . . "
>
> In *Vaca* and *Hines*, however, we recognize that the rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminating, dishonest, arbitrary or perfunctory fashion as to breach its duty of fair representation. In such instance, an employee may bring suit against both the employer and the union. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v.*

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[5] *Kennedy v. Electricians Pension Plan IBEW NO. 995*, 954 F.2d 1116 (CA 5 – 1992); *Carpenters Local Union No. 1846 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Pratt Fransworth, Inc.*, 609 F. Supp. 1302 (EDLA – 1984); *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed.2d 476 (1983).

> *Anchor Motor Freight*, 424 U.S. 554 (1976); *United Parcel Service v. Mitchell*, 451 U.S. 561 (1981); *Bowen v. USPS*, 459 U.S. 212 (1983); *Czosek v. O'Mara*, 397 U.S. 25 (1970). . . . "

Del Costello involved a Hybrid case, involving a suit against both the union and the employer. Petitioner in this instance brought the action against the Union in State Court in Louisiana pursuant to the Louisiana Civil Code for breach of contract. Petitioner did not bring suit under the National Labor Relations Act for the reason, that as a Supervisor, he was excluded from coverage of the Act. Had he done so, his suit would have been dismissed.

In *Del Costello*, the Court reversed the Court of Appeals and remanded the case to the District Court to resolve the issue of tolling of the statutes of limitations in reference to a delay in bringing the action. At page 166, the Court noted:

> "He is called upon, within the limitation period, to evaluate the adequacies of the union's representation, to retain counsel, to investigate substantial matters that were not an issue in the arbitration proceedings, and to frame his suit. . . . "

The District Court in the instant case noted the statute of limitations was tolled by the Union's insistence on production of the Coast Guard's Investigation Report which was never produced, notwithstanding a lawsuit under the Freedom of Information Act in which the Court found the Coast Guard at fault.

The Court of Appeals for the Fifth Circuit noted that there is no federal statute of limitations especially applicable to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Where there is no federal statute of limitations, federal courts will normally "borrow" from the most closely analogous state statute.

Petitioner's case is not a Hybrid case as set forth in *Del Costello*. Petitioner, as a Supervisor, could not bring a claim for breach of the duty of fair representation under 29 U.S.C. § 160(b) of the Act. In *Del Costello* the employee was not a supervisor, but an employee to whom the Act was applicable.

The Court of Appeal found that SMITH's status as a supervisor was not relevant because, he brought a suit under 29 U.S.C. § 185(b). The Court noted that 29 U.S.C. § 160(b) applies only to particular causes of action, not to particular types of people. That is to say, notwithstanding the limited application of 29 U.S.C. § 160(b) to nonsupervisory personnel, the finding of the Court is in conflict with the decisions in the Second, Third, and Ninth Circuits which have clearly found licensed officers to be supervisors and not employees under the Act.

In *Del Costello*, petitioner was not a supervisor. There remained an unresolved issue of a tolling of the statute of limitations because of certain requirements of the Union's grievance process. The case was remanded to the District Court to deal with the unresolved issues.

In this case, the District Court and the Court of Appeals addressed the Respondent's recalcitrance in its insistence on petitioner providing the Coast Guard Investigation Report which was never produced, and the impossible requirement that Petitioner prove his entire case

before it would proceed to arbitration. Petitioner was required to retain counsel to investigate the matter, and to obtain evidence before he could frame his suit against Respondent.

Because of Petitioner's status as a supervisor thus not subject to the Act, and because of the unresolved issue of tolling the Statute of Limitations, the Petition For a Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-31436
SUMARY CALENDAR

STUART H. SMITH, JR.,

Plaintiff-Appellant-Cross-Appellee

v.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS,

Defendant-Appellee-Cross-Appellant

Appeals from the United States District Court
for the Eastern District of Louisiana

(Filed Jul. 17, 2002)

Before REYNALDO G. GARZA, JOLLY, and WIENER, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

On October 3, 1992, Appellant Stuart H. Smith, Jr., was serving as third officer aboard an oceangoing cargo vessel berthed in the Port of New Orleans. Smith was employed by Waterman Steamship Corporation ("Waterman"), the owner and operator of the vessel. On that day, the vessel was undocking when it collided with the dock. The collision caused damage to both the vessel and the dock. Holding Smith responsible, Waterman fired him the following day.

At the time, Smith was a member of Appellee International Organization of Masters, Mates and Pilots ("the Union"), which was party to a collective bargaining agreement between Waterman, among other employers. The agreement contained a grievance mechanism for solving labor-management disputes. Under the agreement, the Union had the right to bring a grievance either on its own behalf or on behalf of a member. The agreement further authorized the Union to pursue arbitration should the grievance procedure provide an unsatisfactory resolution.

On October 7, 1992, Smith contacted the Union and asked it to initiate grievance procedures with respect to his October 4 discharge. He claimed that the discharge was without cause. Smith and the Union, each through counsel, exchanged correspondence regarding the grievance for over a year. During that time, the Coast Guard began an investigation of the October 3 collision. The Union would not pursue Smith's grievance until it had received a complete report of the Coast Guard's investigation, which was not available until the Coast Guard completed its investigation in July of 1999.

In July of 1993, Smith filed a lawsuit against Waterman. On January 11, 1994, the Union sent a letter to Smith's attorney, informing Smith that the Union would not pursue his grievance. According to the Union, Smith had abandoned the grievance procedure by not providing the Union with the Coast Guard's investigation report and by bringing litigation against Waterman on his own.

Smith's lawsuit against Waterman failed on summary judgment. Smith later sought to have the judgment set aside, claiming there had been a fraud upon the court. The

district court denied Smith's motion. Smith then turned to the Union, suing it for failing to pursue his grievance. The Union filed a motion for summary judgment, arguing only that the six-month statute of limitations specified in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), is applicable to this case. The district court ruled Smith's claim to be an action for breach of the Union's duty of fair representation and agreed on the six-month statute of limitations. The district court also ruled that the Union breached its duty of fair representation to Smith. However, because the six-month statute of limitations had long since passed, the district court granted the Union's motion for summary judgment.

Smith appeals the district court's application of the six-month statute of limitations. On cross-appeal, the Union objects to the district court's finding that it breached its duty of fair representation.

I

We review a district court's grant of summary judgment de novo. *See Green v. CBS,* 286 F.3d 281, 283 (5th Cir. 2002). Smith filed this claim pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the district court found Smith's claim to be one for breach of the Union's duty of fair representation. We agree. When a "union representing the employee in the grievance/arbitration procedure acts in . . . a discriminatory, dishonest, arbitrary, or perfunctory fashion," that union breaches its duty of fair representation. *DelCostello v. Int'l Brotherhood of Teamsters,* 462 U.S. 151, 164 (1983). Smith alleges damages arising out of the Union's refusal to pursue the grievance mechanism with respect to his

October 4 discharge. He is clearly stating a claim for breach of the Union's duty of fair representation.

There is no federal statute of limitations expressly applicable to a § 301 claim against an employer or to a fair representation claim against a union. Where there is no federal statute of limitations, federal courts will normally "borrow" from the most closely analogous state statute. *See DelCostello,* 462 U.S. at 158. Sometimes, however, state limitation periods do not provide a satisfactory means of enforcing federal law. Where state rules would be at odds with the purpose and operation of federal law, courts will draw statutes of limitations from either related federal statutes or from the federal common law. *See id.* at 162. This is the case with respect to an employee's suit against his employer and his union, to which the six-month limitations period in § 10(b) applies. *See DelCostello,* 462 U.S. at 155; *Thomas v. LTV Corp.,* 39 F.3d 611, 622 (1994). As a formal matter, these suits are considered "hybrid" suits comprising two separate causes of action. First, the employee alleges that the employer has violated § 301. Second, the employee alleges that the union has breached its duty of fair representation, which the Supreme Court has inferred from the scheme of the NLRA. *See DelCostello,* 462 U.S. at 164.

Given the *DelCostello* decision, the question here is whether the six-month limitations period in § 10(b) should apply to an employee's duty of fair representation claim against a union standing alone. We hold that it should. Although *DelCostello* is limited to hybrid cases, the Supreme Court analyzed the two causes of action separately, comparing each to a state-law analog and dismissing each analog as an unsatisfactory means of enforcing federal law. First, the Court found a claim for legal malpractice to

be the closest state analogy to a federal duty of fair representation claim. *See* 462 U.S. at 167. Nevertheless, the Court dismissed the legal malpractice analogy as inadequate because it "suffers from objections peculiar to the realities of labor relations and litigation." *Id.*

The Court found § 10(b) to be a more suitable source from which to borrow a statute of limitations. *DelCostello,* 462 U.S. at 169. Section 10(b) establishes a six-month period for bringing charges of unfair labor practices to the National Labor Relations Board pursuant to section 8 of the NLRA. 29 U.S.C. § 158. According to *DelCostello,* unfair labor practices are more analogous to breaches of a union's duty of fair representation than any other state parallel. *See* 462 U.S. at 169. Although the Court did not necessarily define all breaches of a union's duty of fair representation as unfair labor practices, it did note that "the family resemblance" between the two types of wrongdoing "is undeniable and that indeed there is a substantial overlap." *Id.* at 170.

The district court did not err in applying § 10(b)'s six-month limitations period to Smith's claim. Smith himself asserts that he brought this claim under § 301, to which § 10(b) certainly applies. *See DelCostello,* 462 U.S. at 158 n.12. Furthermore, the district court correctly characterized it as a duty of fair representation claim. Following the logic of *DelCostello,* such a claim is also subject to the six-month limitations period.

Smith argues that § 10(b) cannot be applied to him because he was a supervisory employee. Smith's status as a supervisory employee is entirely irrelevant here because Smith brought this duty of fair representation claim under § 301. If Smith were a supervisory employee, he would be

excluded from the definition of "employee" under section 2(3) of the NLRA. *See* 29 U.S.C. § 152(3) ("The term 'employee' . . . shall not include . . . any individual employed as a supervisor."). This would preclude him from bringing an action against the Union for violation of § 8 of the NLRA. *See NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1294-95 (5th Cir. 1980).

Nonetheless, as a statute of limitations, § 10(b) applies only to particular causes of action, not to particular types of people. By its express terms, it applies to § 8 causes of action. *See* 29 U.S.C. § 160(b). It applies to § 301 and duty of fair representation claims by analogy. *See DelCostello,* 462 U.S. at 167. Section 10(b)'s six-month period of limitations applies to Smith's suit against the Union whether or not he was a supervisor. Thus, we affirm the district court's application of the six-month statute of limitations and its grant of summary judgment in favor of the Union.

II

On cross-appeal, the Union's argues [sic] that the district court erred by finding that it breached its duty of fair representation to Smith. The Union argues that the district court made its findings *sua sponte* and without notice in violation of Rule 56 of the Federal Rules of Civil Procedure. *See In re Hailey,* 621 F.2d 169, 171-72 (5th Cir. 1980); *Powell v. United States,* 849 F.2d 1576, 1578-79 (5th Cir. 1988). By affirming the district court's grant of summary judgment in favor of the Union, we render moot the Union's cross-appeal.

III

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STUART H. SMITH, JR.	**CIVIL ACTION**
VERSUS	**NO. 01-1257**
INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS	**SECTION "T"(1)**

(Filed Nov. 9, 2001)

Before this Court is a Motion for Summary Judgment filed on behalf of the Defendant, International Organization of Masters, Mates and Pilots ("the Union"), pursuant to Rule 56 of the Federal Rules of Civil Procedure. The motion came for hearing on September 26, 2001, without oral argument. The Court, having reviewed the memoranda submitted by the parties, the exhibits, the record, and the applicable law, is fully advised on the premises and ready to rule.

ORDER AND REASONS

I. BACKGROUND:

The events giving rise to this action began on or about October 2, 1992, when the Plaintiff, Stuart H. Smith, Jr. ("Smith"), was employed by Waterman Steamship Company ("Waterman") as a third mate aboard the S/S STONEWALL JACKSON. On October 3, 1992, the master of the vessel, Dennis K. O'Laughlin, assigned Smith the duty of reporting the distance between the stern of the vessel and the wharf during an undocking maneuver. The stern of the vessel hit the wharf during the undocking procedure, damaging both the vessel and the wharf. The

next day Smith was terminated. Waterman attests that Smith was terminated for not carrying out his assigned duties.

While employed on the S/S STONEWALL JACKSON, Plaintiff was a member of the collective bargaining unit established under the multiemployer collective bargaining agreement covering offshore vessels then in effect between the Union and various signatory employers, including Waterman. The parties' Master Agreement ("Master Agreement") was first effective June 16, 1982 and was revised and extended by the Union and Waterman from time to time thereafter. The most recent such Addendum insofar as concerns the facts here at issue was a Memorandum of Understanding covering the term July 1, 1990-June 30, 1994. That Master Agreement and all Addenda thereto through June 30, 1994 constitute the entire collective bargaining agreement in effect at all times relevant to this action.

The Master Agreement contained a contractual grievance mechanism for resolving labor-management disputes. Under the Master Agreement, the Union had the right to grieve a dispute either on its own behalf or on behalf of an employee in accordance with the set forth procedures. The Master Agreement further authorized the Union to pursue a grievance to arbitration in the event the grievance process failed to resolve the claim to its satisfaction.

On October 7, 1992, Mr. Smith contacted Arthur Holdeman, Gulf Area Vice President of the Union, and requested that the Union initiate grievance proceedings. Mr. Smith based his grievance on his allegation that his

discharge was without cause. On October 22, 1992, Plaintiff requested that Al Groh, Vice President of the Pacific Area of the Union, schedule a formal hearing concerning the discharge. No action on the grievance was taken until December, 31, 1992, when then general counsel of the Union, Burton Epstein, provided Mr. Smith's attorney with a copy of the Master Agreement, which included the provisions for the grievance procedure.

On March 10, 1993, the new general counsel for the Union, Ernest Cohen, indicated in a correspondence to the Secretary-Treasurer of the Union that Mr. Epstein had actually scheduled an arbitration hearing. However, on that same date in a letter to Plaintiff's counsel, Mr. Cohen informed Plaintiff's counsel that there was a Coast Guard investigation into the allision at issue. Additionally, Mr. Cohen requested from Plaintiff's counsel any and all relevant information the Plaintiff or his counsel may have had regarding the incident.

Because Plaintiff's counsel expressed concerns about attorney/client privilege, Mr. Cohen addressed a further letter to Plaintiff's counsel on March 30, 1993 requesting that Plaintiff himself provide any relevant information directly to Mr. Cohen. By response of April 5, 1993, Plaintiff's counsel stated that his client had not received a copy of the Coast Guard report and requested deferral of the Union's evaluation process if the report was received within thirty days.

On June 21, 1993, Plaintiff's counsel wrote Mr. Cohen to notify him that he had obtained the greater part of the Coast Guard's file and that his client wished to bring the matter to arbitration. In response, Mr. Cohen set forth the manner in which the Union would process the grievance

through the contractual grievance procedures before making a decision as to whether to arbitrate in a letter dated June 28, 1993.

On July 9, 1993, Plaintiff's counsel sent a letter to Mr. Cohen asking him to subpoena personnel members of the S/S STONEWALL JACKSON. Along with that correspondence, Plaintiff's counsel enclosed a copy of the Coast Guard record that was available at that time. Mr. Cohen did not respond to the July 9, 1993 correspondence.

Mr. Smith filed suit against his employer, Waterman, in July of 1993, alleging he was wrongfully discharged. Mr. Smith now alleges that he was forced to bring suit against Waterman because the Union did not commit to a resolution of the grievance. In November of 1993, Mr. Cohen and Plaintiffs counsel corresponded regarding a counterclaim asserted by Waterman in the wrongful discharge suit. The correspondence specifically addressed whether the Union or Waterman had an obligation to provide Plaintiff with a defense to that counterclaim. In a letter dated December 6, 1993. Mr. Cohen advised Plaintiff's counsel that the Union did not have a contractual obligation to provide counsel to the Plaintiff in regard to his defense of Waterman's counterclaim.

Plaintiff counsel's responsive letter of December 13, 1993, claimed that Plaintiff had to pursue his litigation against Waterman because the Union refused to press the grievance on behalf of Mr. Smith. On January 11, 1994, Mr. Cohen informed Plaintiff's counsel that, due to the alleged fact that Mr. Smith did not provide the Union with the complete Coast Guard investigation, and due to the fact that Mr. Smith pursued the matter of his discharge in litigation with Waterman, it was not reasonable for the

Union to take any further action concerning Mr. Smith's grievance.

The complete Coast Guard Marne [sic] Casualty Report into the allision at issue was released by the Coast Guard on July 20, 1999.

On April 12, 2001, Mr. Smith filed the instant suit against the Union alleging that the Union failed to honor the terms and conditions of the working agreement in effect between the Union and the Plaintiff's employer. The Union removed this action to this Court asserting that this Court had original jurisdiction under Section 301(a) of the Labor Relations Act, 29 U.S.C. §301(a).

II. LAW AND ANALYSIS

A. The Law on Summary Judgment

The Federal Rules of Civil Procedure provide that a court should grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Stults v. Conoco, Inc.*, 76 F.3d 651, 655-56 (5th Cir. 1996) (citing *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 912-13 (5th Cir.) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), *cert. denied*, 506 U.S. 832 (1992)). When the moving party has carried its burden under Rule 56(c),

its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. The nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis supplied); *Tubacex, Inc. v. M/V RISAN*, 45 F.3d 951, 954 (5th Cir. 1995).

Thus, when the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Matsushita Elec. Indus. Co.*, 475 U.S. at 588. Finally, the Court notes that substantive law determines the materiality of facts, and only "facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Statute of Limitations Applicable to Plaintiff's Action.

The Defendant has filed this motion based on its allegation that the six-month statute of limitations specified in Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §160(b), is applicable to the case at bar. The Defendant argues that Mr. Smith's action is against the Union for breach of the applicable bargaining agreement, and it therefore is an action for breach of the Union's duty of fair representation. *See Richardson v. United Steel Workers of America*, 864 F.2d 1162 (5th Cir. 1989). If this is classified as a duty of fair representation case, the six-month limitations period of section 10(b) of the NLRA applies. *See Delcostello v. International Broth.*

Of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983).

The Plaintiff asserts that this action does not fall into the category of a duty of fair representation case. Rather, this case, according to the Plaintiff, sounds in contract. If this case is in fact in contract, then Louisiana Civil Code Article 3499 should apply, and the applicable statute of limitations is ten years.

Because the union acts as agent of all the employees, it owes each of them, whether or not a union member, the duty of fair representation. When a union acts as the collective bargaining agent of its members, it is obliged to secure the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. *See Richardson v. United Steel workers of America*, 864 F.2d 1162, 1165-66 (5th Cir. 1989); *citing Vaca v. Sipes* 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842, 850 (1967) A union breaches its duty of fair representation when, "the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion." *Delcostello v. International Broth. Of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983); *citing Vaca v. Sipes* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

In his Original Petition for Damages in state court, Plaintiff alleged, "At all material times, the INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS was the collective bargaining agent for its members employed by WATERMAN STEAMSHIP CORPORATION." *See* Plaintiff's Petition for Damages, Paragraph 4. Therefore, taking the Plaintiff's allegations as true, the

Union was the collective bargaining agent for the Plaintiff during the time of the incidents in question.

The Plaintiff alleges in his Petition for Damages that his damages arise out of the Union's refusal to provide legal counsel, or to refer the matter to arbitration. *See* Plaintiff's Petition for Damages, Paragraph's 10, 11, 13, 14. In his Memorandum in Opposition to this Motion, the Plaintiff illustrates his numerous requests for arbitration by the Union. Although the parties exchanged correspondence regarding the grievance, the Union did not pursue Mr. Smith's grievance. The Union alleges that it did not pursue the grievance because Mr. Smith did not produce the investigation findings by the Coast Guard into the allision that led to Mr. Smith's determination. Mr. Smith alleges that he did not produce the investigation findings because the investigation was not completed at the time of the Union's request.

The reason the Union did not bring the matter to arbitration is irrelevant. The Union had a duty as the collective bargaining agent to bring Mr. Smith's grievance to arbitration. By requesting numerous documents, and by not bringing the matter to resolution, the Union acted in a perfunctory fashion and therefore breached its duty of fair representation to Mr. Smith.

The Plaintiff alleges that this case sounds in contract, and that the ten-year prescription period under Louisiana Civil Code Article 3499 should apply. In support of his argument, Plaintiff cites *Kennedy v. Electricians Pension Plan, IBEW No. 995*, 954 F.2d 1116 (5th Cir. 1992), and *Carpenter's Local Union No. 1846 of United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Pratt Farnsworth, Inc.*, 609 F.Supp 1302 (E.D. La. 1984). The

Kennedy case involved an action under the Employee Retirement Income Security Act (ERISA). The Court in *Kennedy* determined that the plaintiff's claim was an action to clarify his future rights under ERISA. The Court found that because ERISA did not provide a statute of limitations for actions brought to clarify future rights, the state law applicable time limits were to be used. The state ten year statute of limitations applied because the claim was based on contract. In the case at bar, there is a statute of limitations under the applicable law, that being section 10(b) of the NLRA. In addition, Mr. Smith's claim is neither under ERISA, nor is it for clarification of future rights. The *Kennedy* case is inapplicable to the case at bar.

In *Carpenter's Local Union No. 1846 of United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Pratt Farnsworth, Inc.*, the plaintiff unions claimed that they were entitled to a Declaratory Judgment that the defendant employers were obligated in contract to the unions. Because the plaintiffs were praying for a Declaratory Judgment on a contract between the unions and the employers, the Court determined that the ten-year prescription period applied. In the instant case, the Plaintiff is not a union, nor is he asking for Declaratory Judgment. In addition, there is an applicable statute of limitations under section 10(b) of the NLRA. Therefore, *Carpenter's Local Union No. 1846 of United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Pratt Farnsworth, Inc* is inapplicable.

C. Time at which the Applicable Statute of Limitations Began to Run.

The Plaintiff alleges that if section 10(b) of the NLRA applies to the case at bar, the statute of limitations period has not commenced because the Union has extended the period in which the matter can be brought to arbitration pending the receipt of the Coast Guard report into the allision. The Union attests that the last piece of correspondence from the Union to Plaintiff's counsel notified Plaintiff that the Union would not bring the matter to arbitration, and therefore the six-month statute of limitations started after the receipt of the last letter.

In the last letter to Plaintiff's counsel date January 11, 1994, the International Counsel for the Union, Ernest Cohen, wrote the following:

> It would appear from the Order of January 4, 1994 that you did not assert contract rights pursuant to the collective bargaining agreement, but chose instead to sue based on common law theories of wrongful discharge. Apparently your choice in this matter was *to waive all claims* pursuant to the collective bargaining agreement with regard to the incident so as to avoid the arbitration provisions of the collective bargaining agreement.

See Defendant's Exhibit L.

Mr. Cohen went on to state:

> Your client made a choice not to provide MMP with the information necessary to determine whether or not to proceed from grievance to arbitration. Given that decision, *it is not reasonable a this stage for MMP to take any further action*

concerning the particular incident involving Mr. Smith.

See Defendant's Exhibit L.

The letter conveys the Union's position of not taking any further action. Therefore, at the time Mr. Smith was notified that his grievance would not proceed any further, the statute of limitations period commenced.

Mr. Smith did not have any further correspondence with the Union after the January 11, 1994, letter until he filed the current suit on April 12, 2001. If Mr. Smith was not notified by the January 11, 1994, letter from Mr. Cohen that his claim was not going to proceed to arbitration, at some point over the next seven years the Plaintiff had to realize that the Union was not bringing the matter to arbitration.

The Plaintiff alleges that his grievance claim with the Union was basically stayed until the Coast Guard Marine Casualty Report into the allision was completed. The Marine Casualty Report is dated July 20, 1999. After the report, there is no record of Mr. Smith attempting to contact the Union in order to proceed with his grievance. Besides his failure to continue with the grievance after the Coast Guard Report, Mr. Smith did not file this lawsuit against the Union until almost two years after the report was released. At some point after the Marine Casualty Report was released, Mr. Smith had to realize that the Union was not bringing his grievance to arbitration.

In his Petition for Damages, the Plaintiff alleges, "The defendant refused to provide legal counsel, or to refer the matter to arbitration." *See* Plaintiff's Petition for Damages, Paragraph 10. In a letter written by Plaintiff's

counsel on December 13, 1993, Plaintiff's counsel stated that Mr. Smith was forced to file suit against his employer because the Union refused to press the grievance on behalf of the Plaintiff. If Plaintiff alleges that his damages are the result of the Union not bringing the matter to arbitration, at some point he had to know that the Union was not going to bring the matter to arbitration. The only way that this suit is timely under the applicable six month statute of limitations is if the Plaintiff was first notified on or after October 2000, that the Union was not bringing his matter to arbitration. Given the fact that the last correspondence with the Union stating that the matter was not proceeding to arbitration occurred on January 11, 1994, the Plaintiff knew his matter was not proceeding to arbitration before October 2000. Therefore, the Plaintiff's action is time-barred.

III. CONCLUSION

For the forgoing reasons, the Court finds that the six-month statute of limitations specified in Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §160(b), is applicable to the case at bar. Because the instant suit was not filed within six months from when he was notified that his grievance would not proceed to arbitration, the Plaintiff's claims are time-barred.

Accordingly,

IT IS ORDERED that Defendant's Motion for Summary Judgment (Doc. 4) be, and the same is hereby **GRANTED** pursuant to Rule 56 of the Federal Rules of Civil Procedure.

New Orleans, Louisiana, this 8th day of November, 2001.

/s/ G. Thomas Porteous, Jr.
G. THOMAS PORTEOUS, JR.
UNITED STATES DISTRICT JUDGE

FILED
NOV 13 2002
OFFICE OF THE CLERK

No. 02-514

In The
Supreme Court of the United States

STUART H. SMITH, JR.,

Petitioner,

versus

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The questions framed by Petitioner for review do not accurately reflect the proceedings below, as Respondent shows hereinafter:

1. **Whether the six-month limitation period for presenting claims pursuant to 29 U.S.C. §160(b) [of] the National Labor Relations Act applies to a contract action brought in a State Court, and is applicable to a claim for breach by the Petitioner, a licensed Merchant Marine Officer and Supervisor, not considered an employee under 29 U.S.C. §152(3).**

The manner in which this issue is framed invites assumptions not supported in the Record and the decisions of the courts below. **First**, though the Smith action was **filed** in a Louisiana state court, it did not state a Louisiana cause of action but rather a federal one alleging violation of the Union's duty of fair representation. The action was therefore timely removed to federal district court as preempted by §301 of the Labor Management Relations Act, 29 U.S.C. §185. Neither court below disputed that removal, nor did Petitioner seek remand. Both courts held that the complaint alleged a federal violation of the duty of fair representation ("DFR") owed by Respondent, a labor organization, to Petitioner, a member of the bargaining unit covered by the then-current collective bargaining agreement in effect between Respondent and Petitioner's employer. **Second**, because Petitioner did not allege his supervisory status precluded application of the §10(b) statute until reaching the appellate court, the district court issued no fact findings or legal conclusions on his actual status. However, the

QUESTIONS PRESENTED FOR REVIEW – Continued

recognition clause of the collective bargaining agreement at issue stipulates "Licensed Deck Officers, including Master [sic]," to be "supervisory and professional," (Rec. 000226).

2. **Assuming, arguendo, that the six-month limitation period under §160(b) does apply to Plaintiff's claim, whether Respondent's refusal to proceed to arbitration, or cooperate with Petitioner in the production of evidence, in light of the Coast Guard's actions, tolled the limitation period.**

This question is ambiguous and confusing in that it questions whether Respondent's **refusal** to arbitrate Petitioner's grievance had the effect of suspending or "**tolling**" the commencement of the §10(b) statute of limitations. The district court held that the Union **did** communicate its refusal to arbitrate, the effect of which was to cause the statute of limitations to **commence** its running. The district court further held that no conduct of the Union had the effect of extending the processing of the grievance in view of the Union's January 11, 1994 notification (Pet. App. 19) that it refused to process the grievance further.

PARTIES TO THE PROCEEDINGS

The following is a complete listing of all parties to the proceedings in the court of appeals for the Fifth Circuit:

1. Stuart H. Smith, Jr.

2. International Organization of Masters, Mates and Pilots

Petitioner's statement that Waterman Steamship Corporation was also a party to the proceedings in the court below is therefore in error.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THESE PROCEEDINGS BY THE COURTS BELOW

The Opinion from which Petitioner seeks certiorari is officially reported as follows:

1. *Stuart H. Smith, Jr. v. International Organization of Masters, Mates and Pilots*, 297 F.3d 380 (5th Cir. 2002).

The Opinion in its unofficial form is reproduced in Petitioner's Appendix to his Petition for Writ of Certiorari at Pet. App. 1-7. All citations made herein are to the unofficial Opinion included in Petitioner's Appendix.

The above-described Court of Appeals' decision affirmed summary judgment granted in the United States District Court in favor of Respondent herein, filed November 9, 2001, as follows:

2. *Stuart H. Smith, Jr. v. International Organization of Masters, Mates and Pilots*, ____ F.Supp ____ (E.D. La. 2001) (filed November 9, 2001) (No. 01-1257).

   The district court's opinion has not been officially reported to date, but is unofficially reported at 2000 WL 1414983 and 145 Lab. Cas. ¶11,215.

The district court's opinion is also reproduced in Petitioner's Appendix at Rec. App. 8-20.

STATUTES AT ISSUE

1. Labor Management Relations Act ("LMRA"):

§301(a), 29 U.S.C. §185(a):

> (a) **Suits by and against labor organizations**
>
> Suits for violation of contracts between an employer and a labor organization representing

employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

2. **National Labor Relations Act ("NLRA", "The Act"):**

§2(3), 29 U.S.C. §152(3) (reproduced at Pet. 2).

§10(b), 29 U.S.C. §160(b) (reproduced at Pet. 2-3).

3. **Employee Retirement Income Security Act ("ERISA"):**

§502, 29 U.S.C. §1132(a)(1)(B):

(A) **Persons empowered to bring a civil action**

A civil action may be brought–

(1) by a participant or beneficiary –

. . . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;. . . .

STATEMENT OF THE CASE

As a result of damage sustained by the SS Stonewall Jackson on October 3, 1992, and his subsequent discharge, Petitioner Stuart H. Smith, Jr. ("Smith") filed a grievance against his employer, Waterman Steamship Corporation ("Waterman") through his bargaining representative, International Organization of Masters, Mates and Pilots ("the Union"). The grievance was first asserted on October 7, 1992, through Smith's counsel, Ralph E. Smith ("Ralph Smith"). At that time, Smith was a member of the bargaining unit defined by the collective bargaining agreement then in effect between the Union and Waterman, among other employers. That agreement empowered the Union to bring a grievance either on its own behalf or on behalf of a unit member, and authorized the Union to pursue arbitration should a grievance not be resolved to the Union's satisfaction.

Smith and the Union, each through counsel, exchanged correspondence thereafter spanning the period October 7, 1992 through January 11, 1994. During the same period Smith made efforts to procure from the Coast Guard a copy of its investigative report concerning the incident, but succeeded only in obtaining "the greater part of the file", as he reported in his letter of June 21, 1993 (Rec. 000340) to Union counsel. Smith's letter also withdrew his prior request (Rec. 00059) for the Union's processing of the grievance to be held in abeyance, demanding that the Union proceed to arbitration. By written response of June 28, 1993 (Rec. 000342), Union counsel Ernest Allen Cohen ("Cohen") advised Ralph Smith briefly of the steps through which the Union must proceed in order to assert the grievance against Waterman and eventually decide whether or not to take the matter to arbitration

should no satisfactory resolution be reached. To that end, Cohen requested a copy of the "Coast Guard file and any other relevant materials" in Smith's possession – that is, the partial file Ralph Smith had on June 21, 1993 identified as warranting his arbitration demand. Ralph Smith's subsequent letter of July 9, 1993 (Rec. 000062) purports to furnish this "Coast Guard record" to the Union on that date. But ¶12 of Cohen's Affidavit offered in support of the Union's summary motion in the district court contrarily asserts no documents were actually received by the Union (Rec. 00160).

One week later, on July 16, 1993, Smith filed in the federal district court a seaman's wrongful discharge claim against Waterman in which Waterman counterclaimed against Smith for damages to the vessel.[1] When Ralph Smith subsequently called upon the Union to defend Smith on this counterclaim in the federal court proceedings, Cohen rejected the demand, on December 6, 1993, as baseless in the absence of supporting authority for doing so (Rec. 000344). In response, on December 13, 1993, Ralph Smith renewed his demand upon Cohen for arbitration (Rec. 00347).

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[1] On January 4, 1994, the district court dismissed Smith's unfair discharge claim against Waterman (Rec. 175-76) and the dismissal was subsequently affirmed by the Court of Appeals for the Fifth Circuit (Rec. 164-68). Dismissal of a subsequent action filed by Smith against Waterman to set aside the earlier district court judgment, claiming there had been a fraud on the court, also failed. This decision was similarly affirmed by the Court of Appeals for the Fifth Circuit, *Smith v. Waterman Steamship Corp*, No. 091-30442 (Summary Calendar, unpublished) [introduced by Respondent in the appellate court pursuant to 5th Cir. Rule 47.5.4 as the law of the case] (Resp. App. 1-6).

On **January 11, 1994** (Resp. App. 7-10), the Union unequivocally notified Ralph Smith by letter that it refused to pursue the grievance further, citing Smith's decision to abandon the grievance procedure in favor of a common law action against Waterman outside the parameters of the collective bargaining agreement. Smith offered no response and there was no further contact between the parties prior to Petitioner's filing of this action on April 12, 2001.

The district court thereafter granted the Union's motion for summary judgment, confined strictly to its argument that the six-month statute of limitations specified in §10(b) of the NLRA applied. The district court agreed both that the action was one for breach of the Union's DFR and that the §10(b) statute applied. The court also ruled that the statute commenced to run on January 11, 1994, when Cohen advised Ralph Smith it refused to process the grievance further, and that the statute had therefore expired by the time suit was filed (Pet. App. 19).

The court of appeals[2] affirmed the district court's grant of summary judgment in favor of the Union, specifically characterizing Smith's cause of action as one for breach of the Union's DFR (Pet. App. 4). In reliance on *DelCostello v. Int'l Bro. of Teamsters,* 462 U.S. 151, 103 S.Ct. 2281 (1983), the court held that the §10(b) statute of limitations applies both to an employee's "hybrid" suit

[2] The only issue presented on Smith's appeal was, "Whether the District Court was in error in dismissal of the action based on the six-month prescriptive period in the National Labor Relations Act."

against his employer and his union, as well as to an employee's DFR claim standing alone. *Id.*

The appeals court also addressed Smith's claim that the §10(b) limitations period should not be applied to him because he is a supervisory employee excluded from the §2(3) statutory definition of "employee" and therefore unable to assert unfair labor practice charges against the Union under §8 of the NLRA. The court held that Smith's status as a supervisory employee is "entirely irrelevant here because Smith brought this duty of fair representation claim under §301, to which §10(b) certainly applies" (Pet. App. 5). The court determined (Pet. App. 6):

> . . . , as a statute of limitations, §10(b) applies only to particular causes of action, not to particular types of people. . . . Section 10(b)'s six-month period of limitations applies to Smith's suit against the Union whether or not he was a supervisor.

It is from the above Judgment that Smith now appeals to this Honorable U.S. Supreme Court, again arguing the §10(b) limitations period cannot be applied to him as a supervisory employee and, further, that the Union's refusal to proceed to arbitration on his behalf "tolled" the statute in any event.

REASONS FOR DENYING THE WRIT

1. The decision of the Court of Appeals presents no question for review that meets the standards defined by Rule 10, Rules of the Supreme Court for granting certiorari.

Rule 10 plainly sets out the compelling reasons upon which the Court may normally grant Writ of Certiorari – a writ that is "not a matter of right, but of judicial discretion." Yet Smith offers no such compelling basis for the grant requested in these proceedings. He merely disputes the decision of the courts below, relying on the same arguments and the same judicial authorities. While Smith fails to identify the precise basis under Rule 10 for his Petition, he impliedly asks the Court to exercise jurisdiction on the basis of subsection (a) of Rule 10 – that is, that the decision below conflicts with that of another United States court of appeals, arguing at page 14 of his Petition that:

> The Court of Appeal found that SMITH's status as a supervisor was not relevant because, he brought a suit under 29 U.S.C. §185(b). The Court noted that 29 U.S.C. §160(b) applies only to particular causes of action, not to particular types of people. **That is to say, notwithstanding the limited application of 29 U.S.C. §160(b) to nonsupervisory personnel, the finding of the Court is in conflict with the decisions in the Second, Third, and Ninth Circuits which have clearly found licensed officers to be supervisors and not employees under the Act.** [*Emphasis added.*]

It is assumed that Smith's authorities for the latter assertion are the judicial citations noted at footnote 1 of page 9 of his Petition.

But no such conflict is apparent. In the course of these proceedings, neither the court below nor the Union has ever at any time disputed the proposition that supervisors are not covered by §8 of the NLRA, or that they are not recognized as statutory employees under §2(3) who may pursue §8 unfair labor practice claims against their employers or against the labor organizations that represent them. In the decision below, the court of appeals expressly held (Pet. App. 6) that Smith's status as a supervisor "would preclude him from bringing an action against the Union for violation of §8 of the NLRA," citing *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1294-95 (5th Cir. 1980). *See also Delta Queen Steamboat Co. v. Dist. 2, MEBA*, 889 F.2d 599 (5th Cir. 1989). This position is fully consistent with similar decisions in other federal courts of appeal specifically recognizing Licensed Deck Officers as supervisory employees not within the protection of §2(3). *See, e.g., Jensen v. Farrell Lines*, 625 F.2d 379 (2d Cir. 1980); *Dente v. Intl. Org. Masters, Mates and Pilots*, 492 F.2d 10 (9th Cir. 1974), *cert. denied,* 94 S.Ct. 2607.

These precedents plainly demonstrate that there is no conflict whatever between the holdings of the courts of appeals for the Fifth, the Second and the Ninth Circuits. All unequivocally agree that supervisors may not assert unfair labor practice claims under §8 of the Act. Nor has Petitioner cited any rulings of these courts contrary to the decision of the court below that supervisory employees pursuing DFR claims are subject to the §10(b) statute of limitations. No other basis for conflict has been identified by Petitioner, and Respondent perceives none. Consequently, no compelling reason of the nature required under Rule 10 supports Petitioner's application for certiorari.

2. It is well settled that the §10(b) statute of limitations is applicable to DFR suits brought by any employee against his bargaining representative.

Petitioner's status as a supervisory employee accords him no special consideration as a DFR litigant: if he wishes to assert a DFR claim, he may expect treatment under the law that is neither more liberal nor less restrictive than that available to a statutory employee. Section 2(3) does not deprive or relieve a supervisor or the union that represents him of the rights also extended to or responsibilities imposed upon statutory employees under other titles of the NLRA. *District 2, MEBA v. Amoco Oil Co.*, 554 F.2d 774 (6th Cir. 1977). In *Amoco*, 554 F.2d at 779, the Court of Appeals for the Sixth Circuit held:

> We hold that a union representing a bargaining unit comprised exclusively of supervisors, within the meaning of 29 U.S.C. §152(11), is a "labor organization representing employees" entitled to invoke federal jurisdiction under 301(a).

Accordingly, Smith's inability to assert rights under §8 of the NLRA that are extended only to §2(3) statutory employees does not preclude his right as a supervisory employee to assert a DFR claim under §301 against the labor organization that acts as his bargaining representative. *Delta Queen Steamboat Co. v. Dist. 2, MEBA, supra; Richardson v. United Steelworkers of America*, 864 F.2d 1162 (5th Cir. 1989); *Dente v. Intl. Org. Masters, Mates & Pilots, supra*; *Jensen v. Farrell Lines, Inc., supra.*

Moreover, when a supervisory employee does assert a DFR claim – one "implied under the scheme of the National Labor Relations Act," *DelCostello v. International Bro. of Teamsters, supra*, 462 U.S. at 163, 103 S.Ct. at

2290 – he is equally bound by the same six-month statutory limitation period established under *DelCostello* that applies to all DFR plaintiffs, as the court below explicitly held (Pet. App. 4):

> Smith argues that §10(b) cannot be applied to him because he was a supervisory employee. Smith's status as a supervisory employee is entirely irrelevant here because Smith brought this duty of fair representation claim under §301.

The court below held, further:

> . . . as a statute of limitations, §10(b) applies only to particular causes of action, not to particular types of people. By its express terms, it applies to §8 causes of action. *See* 29 U.S.C. §160(b). It applies to §301 and duty of fair representation claims **by analogy**. *See DelCostello*, 462 U.S. at 167. Section 10(b)'s six-month period of limitations applies to Smith's suit against the Union whether or not he was a supervisor. [*Emphasis added.*]

Petitioner's Petition does not seek to reverse the lower court holdings in this matter that his action states a DFR claim under §301. That being the case, *DelCostello* must be applied, and his claim is subject to the six-month §10(b) limitation period this Court has established.

Smith nevertheless seeks to persuade this Honorable Court to reverse *DelCostello*'s holding that the most analogous claim to a DFR action is an unfair labor practice charge brought under Section 8 of the NLRA, which requires application of the §10(b) limitations period, suggesting instead that the ten-year statute applicable to personal actions under La. Civ. Code, Art. 3499 should be substituted in this action. But this and similar statutory

limitations alternatively proposed in *DelCostello* were fully analyzed and firmly rejected, as the appellate court held (Pet. App. 4):

> Where there is no federal statute of limitations, federal courts will normally "borrow" from the most closely analogous state statute. *See DelCostello*, 462 U.S. at 158. Sometimes, however, state limitation periods do not provide a satisfactory means of enforcing federal law. Where state rules would be at odds with the purpose and operation of federal law, courts will draw statutes of limitations from either related federal statutes or from the federal common law. *See id.* at 162. This is the case with respect to an employee's suit against his employer and his union, to which the six month limitations period in §10(b) applies. *See DelCostello*, 462 U.S. at 155; *Thomas v. LTV Corp.*, 39 F.2d 611, 622 (1994).

In *DelCostello*, this Honorable Court specifically determined that the most analogous **state** action is not a state contract or "personal" action, but a legal malpractice claim, 462 U.S. at 167, 103 S.Ct. at 2292. Nevertheless, the Court rejected the legal malpractice analogy as inadequate in the context of labor relations litigation, *id.*, and selected instead the federal limitations period applicable under §10(b). While the Court specifically declined to rule on whether all DFR actions constitute unfair labor practices, 462 U.S. at 170, it nevertheless recognized that "the family resemblance is undeniable, and indeed there is a substantial overlap." Accordingly, it ultimately held the §10(b) statute was a more suitable source from which to borrow than any other alternative. *DelCostello*, 462 U.S. at 169. The Court below agreed (Pet. App. 5).

In *Erkins v. United Steelworkers of America*, 723 F.2d 837, 839 (11th Cir. 1984), the court held that the similarity of rights and considerations recognized by the Supreme Court in *DelCostello* "exists even more clearly when a claimant brings only a breach of duty of fair representation claim against a union." The court went on to find, citing *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 63, 101 S.Ct. 1559, 1564 (1981), that the §10(b) limitations period equally governs a DFR action whether brought alone or in context of a "hybrid" §301 action against the employer and a DFR action against a union. The court below also adopted the position that the §10(b) statute applies to a DFR claim against a union standing alone (Pet. App. 4), consistent with prior-established precedent in the Fifth Circuit. *See e.g., Richardson v. United Steelworkers of America, supra*; *Degan v. Ford Motor Co.*, 869 F.2d 889, 892 (5th Cir. 1989); *Jones v. Truck Drivers Local Union 299*, 748 F.2d 1083 (5th Cir. 1984); *Ranieri v. United Transportation Union*, 743 F.2d 598 (5th Cir. 1984); *Barrett v. Ebasco Constructors, Inc.*, 868 F.2d 170 (5th Cir. 1989).

Yet Smith continues to assert that the La. Civ. Code Art. 3499 statutory period, because previously applied to "labor litigation" (Pet. 11) that he perceives as parallel to a DFR action, should govern his DFR action. However, the labor cases cited by Smith (Pet. 12, fn.5) do not support this argument and in fact are completely inapposite. *Kennedy v. Electricians Pension Plan, IBEW No. 995*, 954 F.2d 1116 (5th Cir. 1992), involved a past-service credit benefit claim by participants in a multiemployer pension plan brought under §502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"); no claim was brought by an employee against a union nor did the action

assert DFR claims. In *Carpenters Local Union No. 1846 v. Pratt Farnsworth [on remand]*, 609 F.Supp. 1302 (E.D. La. 1984), the Union plaintiff sought to enforce, against an employer and its alleged alter ego, the employer promise set out in a collective bargaining agreement to pay contributions owed to the multiemployer funds sponsored by the union and all employers subject to the same agreement. Again, no claim was brought by an employee against a union nor did the action assert DFR claims. Thus, Petitioner's reliance on *DelCostello* (Pet. 12, fn.5) for the proposition that La. Civ. Code Art. 3499 also applies to Smith's DFR action against his union alleging failure to represent him adequately, is woefully misguided. Substantively and in terms of the actions asserted, *Kennedy*, *Pratt Farnsworth* and the instant case are not remotely alike.

The Court's decision in *DelCostello* has been long accorded the greatest of respect. It remains unchallenged to this very day. It is routinely and faithfully observed by all lower federal courts and has lent immeasurable stability and reason to the oft-times acrimonious grievance process and the law of the shop. There is absolutely no reason to reconsider or disturb this decision, and Smith has raised no acceptable basis, compelling or otherwise, for the Court to do so. Smith's DFR claim should be subjected to the same §10(b) analogous limitations period that is uniformly applied by federal courts to the DFR claims of statutory employees and supervisory employees alike.

3. The six-month limitations period commenced to run when the Union advised Petitioner it refused to process Smith's grievance further.

Following more than a year of written communication between Smith's and the Union's respective counsel, and

irrespective of whether the Union was by law culpable in the DFR breach so precipitously assessed by the district court against the Union[3], all that is relevant is whether or not the Union notified Smith of its refusal to process the grievance further. That issue is not subject to dispute. On January 11, 1994, the Union clearly and unambiguously notified Ralph Smith that it refused to process Smith's claim further (Resp. App. 7-10), and the district court so found (Pet. App. 19). Smith did not subsequently contest this finding in the court of appeals.

Consequently, it was on January 11, 1994 that Smith's cause of action accrued. *Barrett v. Ebasco Constructors, Inc.*, 868 F.2d 170 (5th Cir. 1989); *Farr v. H.K. Porter Co.*, 727 F.2d 502 (5th Cir. 1984). This, then, was the time for Smith to file the DFR action that he belatedly filed on April 12, 2001. If he disagreed with the Union's January 11, 1994 decision, his proper course of conduct was to file within the following six months a hybrid §301 breach of contract action against Waterman along with a DFR action against the Union for refusing to process his grievance

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[3] The Court will bear in mind that the court below did not rule on the Union's cross-appeal requesting reversal of the district court's finding that the Union breached its DFR because it –

> . . . had a duty as the collective bargaining agent to bring Mr. Smith's grievance to arbitration. By requesting numerous documents, and by not bringing the matter to resolution, the Union acted in perfunctory fashion. . . .

Pet. App. 15. The cross-appeal claimed the district court finding had been issued *sua sponte* and without notice in violation of Rule 56 of the Federal Rules of Civil Procedure. The court of appeals determined the cross-appeal was moot, in view of its affirmation of the district court's dismissal of the action as time-barred.

further[4]. He not only failed to do so, but continued to sit on his rights indefinitely until, having apparently exhausted all other claims available to him, he turned his attention to the Union once more and filed this lawsuit on April 12, 2001, more than seven years later and well outside the applicable six-month statute that expired on July 10, 1994.

4. The Union took no action to toll the running of the §10(b) statute of limitations. But assuming hypothetically that it did, its January 11, 1994 refusal to arbitrate inevitably commenced the running of the statute.

Smith questions whether (according to his perception of the facts at issue) (Pet. at i):

> . . . [the Union's] arbitrary refusal to proceed to arbitration, or cooperate with Petitioner in the production of evidence, in light of the Coast Guard's actions tolled the limitation period.

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[4] It is traditional for DFR litigants to sue both their employer and their bargaining agent, since "the case he must prove is the same whether he sues one, the other, or both." *DelCostello*, 103 S.Ct. at 2281. Therefore, Smith would have had to prove that he had been unfairly discharged by Waterman **and** that the Union had breached its DFR in subsequently processing the grievance. Since the district court in Smith's July 16, 1993 action against Waterman had already determined he had been discharged for cause, it may have proven rather difficult for him to sustain the requisite burden of proof in a DFR action. He must still assume that burden in the event this Court, or any other, subsequently determines his suit should be permitted to proceed on the merits.

Any suggestion that the Union arbitrarily refused to proceed to arbitration, even if based on a district court finding that the Union "had a duty" to arbitrate Smith's grievance that resulted in breach of its DFR, may not be raised before this Court today. Though the issue of whether the Union did act arbitrarily was cross-appealed by Respondent in the court of appeals, the court determined the cross-appeal to be mooted by its finding that Smith's suit was time-barred. Moreover, Petitioner's assertion that the Union refused to "cooperate with Petitioner in the production of evidence" is utterly without basis, for no court has made any such finding.

Nevertheless, Smith's formulation of this issue underscores the divergent expectations of the parties throughout the grievance process and in this subsequent litigation concerning the proper role of the Union and that of the grievant's private counsel in the processing of Smith's grievance against Waterman.

A Union's refusal to take a grievance to arbitration by no means establishes a DFR breach, for an employee has no absolute right to compel his union to arbitrate. *Vaca v. Sipes*, 386 U.S. 171, 191-92, 87 S.Ct. 903, 917-18 (1967); *Landry v. Cooper T. Smith Stevedoring Co.*, 880 F.2d 846 (5th Cir. 1989). Consequently, the Union had no obligation to respond affirmatively or immediately to Smith's demands for arbitration. And when the Union did eventually decide not to arbitrate, its basis for refusing, contrary to Smith's claims, was not his failure to produce the Coast Guard's ultimate decision on its investigations of the decision, which was not issued until 1999, or his apparent refusal – conceded to be an issue of fact – to produce the partial Coast Guard file Ralph Smith had already admitted was in his possession. More importantly, it was his

abandonment of the grievance mechanism in July, 1993 in favor of direct unfair discharge litigation against Waterman.

And the Union was certainly not obligated and assumed no obligation whatever to "cooperate" with the grievant's attorney in first acquiring and then providing documents to him for the apparent purpose of aiding his outside litigation against Waterman. Furthermore, the Union had neither opportunity nor right to subpoena testimony from other Waterman employees, especially when it had not even committed to arbitrate. Rather, the grievance process contemplates it is the grievant's right and obligation to supply to his bargaining agent any documents or other information he believes may support his unfair discharge. Based in part upon the information furnished by the grievant and the documentation it is able to obtain elsewhere, including the employer, the union must then make its own decision on **whether** to arbitrate. That decision will be made with reference to all the facts and information made available to it from all sources, as well as its evaluation of its chances of ultimately prevailing, the likely benefit to grievant, and the benefit that may flow to the unit as a whole.[5] *Stevens v. Moore Business*

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[5] The Union will not presume to explain the arbitration process to this Court, which has recognized and established that the contractual grievance machinery "is at the very heart of industrial self-government." *Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581, 80 S.Ct. 1347, 1352 (1960). Suffice it to say that the concept of an arbitrator's entertaining discovery requests prior to his appointment, or a federal court's enforcement of such discovery, is not only foreign to the process but quite unworkable.

Forms, Inc., 18 F.3d 1443, 1447 (9th Cir. 1994); *White v. General Motors Corp.*, 1 F.3d 593, 595 (7th Cir. 1993).

Be that as it may, Smith's entire argument for tolling borders on frivolous, for the Record is incontrovertible in this one very important factual respect: the Union **did** advise Smith, on January 11, 1994 that it would not pursue his grievance further, and that notification commenced the running of the statute, irrespective of what had transpired before that time. As the district court held (Pet. App. 19):

> The only way that this suit is timely under the applicable six-month statute of limitations is if the Plaintiff was first notified on or after October 2000, that the Union was not bringing his matter to arbitration. Given the fact that the last correspondence with the Union stating that the matter was not proceeding to arbitration occurred on January 11, 1994, the Plaintiff knew his matter was not proceeding to arbitration before October 2000. Therefore, the Plaintiff's action is time-barred.

5. Conclusion.

Based on the foregoing arguments, the Union respectfully urges the Court to deny the petition for certiorari so as to leave standing the decision issued by the Court of Appeals for the Fifth Circuit, dismissing Smith's DFR

action as time-barred by the applicable §10(b) six-month statute of limitations.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30442
SUMMARY CALENDAR

STUART H. SMITH, JR.,

Plaintiff-Appellant,

v.

WATERMAN STEAMSHIP CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

(00-CV-1878-B)

(Filed Jan. 03, 2002)

Before REYNALDO G. GARZA, SMITH and PARKER, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:[1]

In this appeal, we review a district court's denial of a motion to set aside a judgment for fraud upon the court under Rule 60(b) of the Federal Rules of Civil Procedure.

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[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

For the following reasons, we affirm the decision of the district court.

I

On October 3, 1992, Appellant Stuart H. Smith, Jr., was serving as third mate aboard the *S/S Stonewall Jackson*, an oceangoing cargo vessel owned and operated by Appellee Waterman Steamship Corporation ("Waterman") and berthed in the Port of New Orleans. On that day, the vessel was attempting an undocking maneuver, during which Smith was assigned to the vessel's stern and was instructed to estimate and report to the bridge the distance from the vessel to the wharf. During the maneuver, the *Stonewall Jackson* made contact with the dock, and the allision caused damage to both vessel and dock.

Waterman reported the incident to the Coast Guard, which conducted an investigation. Waterman also submitted to the Coast Guard a Form CG-2692 that briefly described the incident. The Form CG-2692 indicated that all equipment aboard the vessel was in good working order at the time of the accident, but the parties debate whether the astern servo valve was working properly at the time of the accident.[2] After its investigation, the Coast Guard concluded that Smith failed to relay correct distance information to the bridge and that this failure was the primary cause of the allision. On October 4, 1992, Waterman terminated Smith's employment.

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[2] The astern servo valve can affect the vessel's movement. *See* Appellant Br. at 7-8.

On July 16, 1993, Smith sued Waterman for wrongful discharge in the Eastern District of Louisiana. The district court concluded that Smith was employed at will and could be discharged with or without cause. The court further concluded that Smith was not wrongfully discharged and granted Waterman's motion for summary judgment. *Smith v. Waterman Steamship Corporation, et al.*, No. CA-93-3207-I (E.D. La. Jan. 5, 1994). The Form CG-2692 was never submitted to the court, and the court never relied upon it.

Smith then appealed to this Court. For the purposes of his appeal, we assumed *arguendo* that Smith could only be discharged for just cause but also concluded that no genuine of material issue of fact existed as to whether Smith was wrongfully discharged. Accordingly, we affirmed the decision of the district court. *Smith v. Waterman Steamship Corporation, et al.*, No. 94-30174 (5th Cir. Sept. 8, 1994). The Form CG-2692 was never submitted to this Court, and this Court never relied upon it.

In the present suit, Smith asked the district court to set aside the earlier judgment under Rule 60(b), arguing that the Form CG-2692 constituted a "fraud upon the Court" because it stated that all equipment aboard the vessel was in good working order at the time of the accident and there is some debate as to whether the astern servo valve was in such order. R. at 331. The district court concluded that there was no fraud upon the court. The court found that, because the allegedly fraudulent Form CG-2692 was neither submitted to nor relied upon by the district court or this Court in the prior litigation, there was no link between the information allegedly missing from the form and the judgments entered in the earlier

lawsuit. Thus, the district court denied Smith's Rule 60(b) motion. Smith appealed.

II

Rule 60(b) of the Federal Rules of Civil Procedure allows a court to set aside a judgment for fraud upon the court. This Court has stated time and again that it will review a district court's Rule 60(b) ruling solely for an abuse of discretion. *Harper Macleod Solicitors v. Keaty & Keaty*, 260 F.3d 389, 394 (5th Cir. 2001); *In re Al Copeland Enterprises*, 153 F.3d 268, 271 (5th Cir. 1998); *Ergo Sicence v. Martin*, 73 F.3d 595, 599 (5th Cir. 1996). Furthermore, when reviewing the denial of a Rule 60(b) motion, this Court does not review the underlying judgment. *Halicki v. Louisiana Casino Cruises*, 151 F.3d 465, 470 (5th Cir. 1998); *Williams v. Chater*, 87 F.3d 702, 705 (5th Cir. 1996); *Schewegmann Bank & Trust Co. v. Simmons*, 880 F.2d 838, 844 (5th Cir. 1989).

Rule 60(b) provides an extraordinary remedy because it can weaken the principle of finality and "the desire for a judicial process that is predictable." *Carter v. Fenner*, 136 F.3d 1000, 1007 (5th Cir. 1998) (quoting *Bailey v. Ryan Stevedoring Company, Inc.*, 894 F.2d 157, 160 (5th Cir. 1990)). Thus, Rule 60(b) relief based on fraud upon the court is reserved for only "the most egregious misconduct." *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989). Fraud upon the court is a narrow concept that should include only those types of fraud that do, or attempt to, "defile the court itself," or frauds that are "perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for

adjudication." *Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980). In *First National Bank v. Lustig*, 96 F.3d 1554 (5th Cir. 1996), this Court further described the kinds of misconduct that could constitute a fraud on the court:

> To establish fraud on the court, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision. Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.

Id. at 1573 (internal quotation marks and citations omitted). The very first test for fraud on the court under Rule 60 is "whether the action in question prevented a party from fully and fairly litigating its case." *Id.*

Smith does not, and cannot, complain that there was a nondisclosure *to the court* of facts allegedly pertinent to the matter before it. He argues that the Form CG-2692 was a fraud upon the court in the prior litigation. As the district court noted below, the Form CG-2692 was never submitted to either the district court or the appellate court in the prior litigation. Therefore, the Form CG-2682 could not have been a nondisclosure to the court.

In essence, Smith complains that there was a nondisclosure *to the Coast Guard* of facts allegedly pertinent to the matter before the court. Given our decision in *First National Bank*, such a nondisclosure would constitute a

fraud upon the court in only the rarest of circumstances. Even if the facts allegedly omitted from the Form CG-2692 were pertinent to the matter before the district and appellate courts in the prior litigation, the omission did not prevent Smith from fully and fairly litigating his case. Neither court considered the Form CG-2692. In fact, the form had absolutely no bearing on the district court's earlier conclusion that Smith was employed at will, a conclusion with which this Court took no issue on appeal.[3]

The district court concluded that the link between the alleged nondisclosure on the Form CG-2692 and the judgment entered in the earlier lawsuit was insufficient to establish a fraud on the court. We find no error in the district court's reasoning. We certainly find no abuse of discretion.

III

Accordingly, we AFFIRM the district court's denial of Smith's Rule 60(b) motion to set aside the prior judgment.

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[3] It should go without saying that a court assuming a point *arguendo* for the purposes of appeal does not hold on that point. Nevertheless, in his complaint, Smith mischaracterizes this Court's opinion in the earlier appeal as "noting that the Collective Bargaining Agreement under which Smith was employed provided that he could only be discharged for just cause." R. at 326; *But see Smith v. Waterman Steamship Corporation, et al.*, No. 94-31074 (5th Cir. Sept. 8, 1994) ("*For purpose of this opinion*, we will *assume arguendo* that the collective bargaining agreement between Smith's union and Waterman is sufficient to invoke 46 U.S.C. § 10313(c) and that Smith could only be discharged for just cause.") (emphasis added).

EXHIBIT
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[LOGO] **International Organization**
Masters, Mates & Pilots

P.O. Box 37273, Tucson, AZ 85740/
Tel. No.: (602) 297-4100/
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TIMOTHY A. BROWN
International President

JAMES T. HOPKINS, [Illegible]
International Secretary-Treasurer

ERNEST ALLEN COHEN, ESQ.
General Counsel

January 11, 1994

Ralph E. Smith, Esq.
203 Carondelet St.
Latter & Blum Bldg., Suite 811
New Orleans, LA 70130-3017

RE: Stuart Smith Grievance – M/V Stonewall Jackson, discharge as Third Mate, collision of vessel with pier while departing

Dear Mr. Smith:

Your letter dated December 13, 1993 is acknowledged.

I have also received from Mr. Spelman of the law firm of Lambos & Giardino a copy of an Order by a United States District Judge for the Eastern District of Louisiana, dated January 4, 1994 which grants summary judgment in favor of Waterman Steamship Corp. against Stuart Smith.

You are correct that the claim by Mr. Smith in connection with the captioned incident was against Waterman

Steamship Corp., not Lykes Brothers. In all other respects, my letter to you of December 6, 1993 represents the position of MMP and is confirmed by this letter.

Your letter of December 13, 1993 is in error in the statement in the last sentence of the second paragraph that the International "refused to press the grievance on behalf of Mr. Smith". For your convenience I enclose a copy of my letter to you dated June 28, 1993 in which I state that "The processing of this grievance has been postponed at the request of the member pending completion of the Coast Guard investigation."

Your letter to me of June 21, 1993 was treated by my letter of June 28th as a request that MMP proceed with the processing of Mr. Smith's grievance.

My letter of June 28, 1993 then requested that you furnish a copy of the Coast Guard file and other relevant materials to Captain Holdeman so that he [may] go forward with the grievance process. The letter of June 28, 1993 further stated that "If you would like to furnish a copy of the Coast Guard file to me, I will review it and be in a position to consult with Captain Hopkins, should the matter not be resolved at the Port level."

I received no further communication from you until I received your November 17, 1993 letter calling upon the International and/or Waterman to provide a defense against a counterclaim which had been asserted by Waterman in the litigation which you brought on behalf of Mr. Smith and which was the subject of the grant of summary judgment against Mr. Smith.

It would appear from the Order of January 4, 1994 that you did not assert contract rights pursuant to the

collective bargaining agreement, but chose instead to sue based on common law theories of wrongful discharge. Apparently your choice in this matter was to waive all claims pursuant to the collective bargaining agreement with regard to the incident so as to avoid the arbitration provisions of the collective bargaining agreement. The Court determined that under common law, Mr. Smith was an employee at will and, therefore, dismissed Mr. Smith's Complaint.

One of the reasons for negotiating a collective bargaining agreement is to modify the common law at-will employment status by contract. Under the collective bargaining agreement, unlike common law, an employee can only be disciplined for just cause. MMP is committed to process grievances of wrongful discharge as requested by its members. MMP is also committed to proceed to arbitration with those grievances that cannot be satisfactorily resolved without arbitration which have a reasonable possibility of success.

Your client made a choice not to provide MMP with the information necessary to determine whether or not to proceed from grievance to arbitration. Given that decision, it is not reasonable at this stage for MMP to take any further action concerning the particular incident involving Mr. Smith.

With respect to any future matters, MMP will continue to vigorously pursue all rights relating to Mr. Smith and other members to the extent such matters are presented to MMP for action.

Sincerely,

/s/ Ernest Allen Cohen
Ernest Allen Cohen
International Counsel

EAC:lm
enclosure
cc: Capt. Timothy A. Brown, International President
Capt. James T. Hopkins, Jr., International Sec.-Treas. and Contracts Enforcement Officer, Offshore Membership Group
Capt. Arthur Holdeman, Vice President, OMG, Gulf Ports